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No. 08-305

IN THE
SUPREME COURT OF THE UNITED STATES

FOREST GROVE SCHOOL DISTRICT,

Petitioner,

v.

T.A.,

Respondent.

==========

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE CITY OF NEW YORK IN SUPPORT OF PETITIONER

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BRIEF OF AMICUS CURIAE THE CITY OF NEW YORK

This brief is submitted on behalf of the City of New York as amicus curiae in support of the Petitioners.

INTEREST OF THE AMICUS CURIAE

The City of New York is a municipal corporation organized and existing under the laws of the State of New York. The City of New York provides substantial funding to the New York City Department of Education. The New York City Department of Education's budget for fiscal year 2009 is $21.1 billion, of which $10.6 billion is provided by the City of New York.

This case is vitally important to amicus, the City of New York, and its children. The City's public school system is the largest public school system in the country, providing primary and secondary education to over one million pre-kindergarten to grade twelve students in approximately 1,500 schools. The City serves more than one-third of the total pupil enrollment of the State of New York. During the 2007-2008 school year, there were 173,856 students in special education in New York City public schools, and the New York City Department of Education spent $3.18 billion on special education.

The New York City Department of Education was a party in a matter previously before this Court: *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F., a minor child*, 06-637, which involved the question of whether the Individuals with Disabilities Education Act permits tuition reimbursement where a child has not previously received special education from a public agency.

On October 10, 2007, this Court affirmed without opinion the decision of the United States Court of Appeals for the Second Circuit in *Tom F.* by an equally divided Court. 128 S. Ct. at 1. Justice Kennedy took no part in the decision of the case. *Id*. at 2. Thereafter, this Court denied certiorari in *Frank G. v. Board of Education*, 128 S. Ct. at 436, with Justice Kennedy again taking no part in the decision.

New York City's experience demonstrates that requiring the payment of private school tuition under the IDEA imposes a financially burdensome substantive obligation on school districts that they would not otherwise be obligated to pay. In New York City, claims for tuition reimbursement by disabled children whose parents have unilaterally placed them in private school and who have not previously received special education or related services from a public agency are governed by the Second Circuit's decisions in *Board of Education of the City School District of the City of New York v. Tom F. on behalf of Gilbert F.*, 2005 U.S. Dist. LEXIS 49 (2d. Cir. 2005) and *Frank G. v. Board of Education of Hyde Park Central School Dist.*, 459 F.3d 356 (2d Cir. 2006), which held that the IDEA permits those students to make such claims.

With that holding the rule in New York, the City of New York has faced an ever-increasing burden of claims for tuition payments. In 2005-2006, the New York City Department of Education received 3023 requests for IDEA administrative hearings in which the parent had unilaterally placed the child in a private school and was seeking to have the New York City Department of Education pay the tuition. In 2006-2007, that number increased to 3688, and in 2007-2008 it increased further to 4368. Meanwhile, the financial cost to the New York City Department of Education is substantial and growing. During 2005-2006, as a result of settlements of these cases and orders by impartial hearing officers, the New York City Department of Education paid over $53 million for the private school

tuition of unilaterally placed children. During 2006-2007, it paid over $57.6 million, and during 2007-2008, it paid over $88.9 million. Furthermore, more than half of these hearing requests involved students who had not previously received special education and related services from the New York City Department of Education.

The increasing numbers of students filing these claims provides strong evidence that the rule set forth by the Ninth Circuit (and Second Circuit), if adopted by this Court, would give a distinct class of people—students who had not previously received special education and related services under the authority of a public agency—the substantive right to obtain private school tuition reimbursement. The reason they are bringing these claims in increasing numbers is precisely because they view the ability to obtain tuition reimbursement as an enforceable right. Indeed, it is not only students and parents themselves, but the private schools the children attend, that view the ability to obtain tuition reimbursement from the New York City Department of Education as an enforceable right. In New York City, some private schools serving primarily disabled students have adopted business plans based upon the expectation that their students will obtain the money to pay tuition by suing the New York City Department of Education under the IDEA. *See Katz, Alyssa, "The Autism Clause: A handful of new schools charge up to $140,000 a year to educate an autistic child. Who can pay that much? Anyone with the right lawyer," (New York Magazine, Oct 23, 2006).* Other New York City private schools require students requesting financial aid to agree to sue the New York City Department of Education for the cost of the private school tuition,[1] and some private

[1] These schools require parents to sign an agreement in which they acknowledge that in the event that they have been offered a public school placement for their child, the parents have chosen to reject the public school placement, and further acknowledge that they are dependent upon

schools include on their websites contact information for lawyers who specialize in suing the New York City Department of Education for tuition payments under the IDEA.[2]

Thus, there can be no doubt that in New York City, students who have never attended public school or received special education and related services from a public school have gained the substantive, enforceable right to obtain tuition reimbursement from the New York City Department of Education, and that this right imposes a substantial financial burden on New York City and the New York City Department of Education that, absent the *Frank G.* and *Tom F.* rule, there would be no legal obligation to pay.

Because of the importance to amicus of the issues before this Court, amicus submits this brief to assist the Court in its resolution of this case.

SUMMARY OF THE ARGUMENT

The Individuals with Disabilities Education Act (IDEA) precludes parents of a child who has never received special education and related services under the authority of a public agency from obtaining reimbursement of their child's private school tuition. The language of 20 U.S.C. § 1412(a)(10)(c), which authorizes parents of "a child who has previously received special education and related services under the authority of a public agency" to request reimbursement of private school tuition, is unambiguous and establishes a condition precedent to a parent's request for tuition reimbursement, and that condition is that the

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receiving prospective payment from the New York City Department of Education following an IDEA impartial hearing in order to pay tuition.

[2] *See, e.g.*, http://www.smithschool.net/resources.asp

child must have previously received special education and related services under the authority of a public agency.

A straightforward reading of the statutory language is consistent with the purpose and structure of the IDEA, which is meant to foster cooperation between parents and school districts. It is also consistent with the IDEA's legislative history, with Congress' intent that children with disabilities be educated with nondisabled children whenever possible, and with Congress' intent to restrict the availability of private school tuition reimbursement.

The Court of Appeals for the Ninth Circuit erred in ruling that 20 U.S.C. § 1412(a)(10)(C)(ii) is ambiguous and does not apply where a child has not previously received special education and related services from a public agency. The Ninth Circuit's ruling would undermine the IDEA's goals by creating a perverse incentive for parents to unilaterally place their children in private school without ever trying the public school placement.

Moreover, the IDEA was enacted pursuant to Congress' power under the Spending Clause, and the Ninth Circuit erred in failing to analyze the IDEA in accordance with this Court's Spending Clause jurisprudence. Statutes enacted pursuant to the Spending Clause must give States clear notice of the conditions Congress has attached to the receipt of federal funds. Even if it were found that the language of the statute were ambiguous, it would be improper to rule as the Ninth Circuit did, because the IDEA does not provide clear notice that a State will be liable for paying the private school tuition for children who have never previously received special education and related services under the authority of a public agency. If the IDEA is ambiguous about whether the States have such an obligation, then that obligation cannot be imposed upon them.

ARGUMENT

I. The IDEA Unambiguously Precludes Private School Tuition Reimbursement Where The Student Has Not Previously Received Special Education And Related Services From A Public Agency, And The Ninth Circuit's Ruling To The Contrary Conflicts With The Plain Language Of The Statute.

A. The Statutory Language Is Unambiguous

Proper respect for the legislative powers vested in Congress implies that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *United States v. Albertini*, 472 U.S. 675, 680 (1985). The Court has "stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat. Bank v. Germain*, 503 U.S. 249, 253-254 (1992). The Court has further recognized that when the statutory language is plain, "the sole function of the courts – at least where the disposition required by the text is not absurd – is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)(quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1989)).

The statutory language at issue in this case, 20 U.S.C. § 1412 (a)(10)(C)(ii), is clear and unambiguous, and establishes a statutory threshold that must be met before parents may ask a hearing officer or courts to order tuition reimbursement when enrolling their child in a private school without the consent of the school district.

The language chosen by Congress means what it says:

> If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school, without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner to that enrollment.

20 U.S.C. § 1412(a)(10)(C)(ii). The plain meaning of this language is that courts and hearing officers may order reimbursement of private school tuition only if the student "previously received special education and related services" from the school district. This interpretation is a straightforward reading of the statutory language, and it should be adopted by this Court.

This interpretation also flows naturally from a reading of the statutory section of which this clause is part. The provision at issue—clause (ii) of subsection (C)—is part of a subsection entitled "Payment for education of children enrolled in private schools without consent of or referral by the public agency." 20 U.S.C. § 1412(a)(10)(C). Subsection (C)(ii) sets forth the authority of hearing officers or courts to order tuition reimbursement, and it says that they may do so where the child has previously received special education and related services from the school district. The statute then sets forth factors hearing officers and courts should consider in determining whether "the reimbursement described in clause (ii)" should be reduced or denied. 20 U.S.C. § 1412(a)(10)(C)(iii). For example, as will be discussed in greater detail, *infra*, a

parent is required to give ten business days notice to the public agency prior to removing the child from the public school. Thus, the statute makes quite plain that what the reimbursement hearing officers or courts may order is the reimbursement specified in subsection (C)(ii), and the language of subsection (C)(ii) states plainly that that reimbursement is available for "students who previously received special education and related services" from the school district.

The language in subsection (C)(ii), therefore, establishes a condition precedent to a parent's request for tuition reimbursement. The language of the statute means that parents who unilaterally place their child in a private school may not request tuition reimbursement—and a hearing officer or court cannot consider granting tuition reimbursement—unless the child has previously received special education and related services under the authority of a public agency.

20 U.S.C. § 1412(a)(10)(C)(ii) was added to the IDEA as part of the 1997 amendments, in which Congress clarified the circumstances under which tuition reimbursement would be available.[3] Through the addition of the language at issue here, Congress restricted the availability of reimbursement. In enacting § 1412, Congress could have made explicit in the statutory language of the IDEA that tuition reimbursement would be available to the parent of a child who has never previously received special education and related services from a public agency, but Congress did no such thing.

B. The Ninth Circuit's Reading Of The Statute Is Untenable

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[3] *See* H.R. Rep. 105-95, at 93, reprinted in 1997 U.S.C.C.A.N. 78, 90.

Despite the clear language of 28 U.S.C. § 1412(a)(10)(C)(ii), the Ninth Circuit held that because the student "never received special education and related services, § 1412 (a)(10)(C)(ii) does not apply in this case. He may recover reimbursement, if at all, only under principles of equity pursuant to § 1415(i)(2)(C)." 523 F.3d at 1087. Thus, even though Congress set forth in § 1412(a)(10)(C) the circumstances under which private school tuition reimbursement is available - and entitled the subsection "Payment for education of children enrolled in private schools without the consent of or referral by the public agency" - the Ninth Circuit created a separate mechanism outside of that subsection for private school tuition reimbursement under the IDEA.[4]

The Ninth Circuit's reading would subvert the intent of Congress to limit the circumstances under which tuition reimbursement would be permitted, and would

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[4] It should be noted that *Burlington Sch. Comm. v. Dep't of Educ.*, 471 U.S. 359 (1985) did not address the situation in this case, where the child never previously received special education and related services under the authority of a public agency. The student in *Burlington* had, prior to being removed from public school, received special education and related services pursuant to an IEP in a public school. *Burlington*, 471 U.S. at 361. After extensive and lengthy discussions which resulted in the school district proposing a new placement for the student, the student's parents rejected the proposed new IEP and enrolled him in a private school. *Id*. at 362. Thus, *Burlington* established the availability of a tuition reimbursement remedy where the student had been removed from a public school special education placement. It did not establish that such a remedy was available where the student had not previously received special education and related services, because the Court had no occasion to consider that question. Thus, the Ninth Circuit's decision does not follow from *Burlington*.

allow a hearing officer and district court to grant relief in any circumstance. Such a reading would permit a court to ignore the limiting language of the 1997 amendments by permitting a parent to receive tuition reimbursement without ever trying the public school program, which we respectfully submit would produce an absurd result.

Under the Ninth Circuit's interpretation, parents who place their children in private school without cooperating with the public school would have an advantage in getting tuition reimbursement over parents who cooperate with the public school, because the limiting factors of 20 U.S.C. § 1412(A)(10)(c)(iii) would not be applicable to a tuition reimbursement claim if the student has not previously received special education and related services from the public agency. For instance, if a child has been receiving special education in a public school, the parents would be obligated, before removing the child from public school and seeking private school tuition reimbursement, to give the school district ten days written notice, and their tuition claim could be reduced or denied if they acted unreasonably. 20 U.S.C. § 1412(a)(10)(C)(iii)(III). If the student had never set foot in a public school placement, however, the parents would have no obligation to give notice to the school district and their tuition claim would not be subject to reduction or denial based upon their unreasonable actions. There is nothing in the text of the statute that suggests that Congress intended to create this unreasonable advantage.

Furthermore, the Ninth Circuit apparently failed to consider the language of § 1412(a)(10)(C)(i) before declaring the language of § 1412(a)(10)(C)(ii) to be ambiguous. Section 1412(a)(10)(C)(ii) is wholly consistent with the plain language of § 1412(a)(10)(C)(i), which limits the obligation of the local educational agency to pay for the cost of private school tuition. § 1412(a)(10)(C)(i) states:

> Subject to subparagraph (A), this subchapter does not require a local

> educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

20 U.S.C. § 1412(a)(10)(C)(i). Sections 1412(a)(10)(C)(i) and (C)(ii) unambiguously demonstrate Congress's intent to limit the circumstances under which tuition reimbursement would be available.

Although the language of 20 U.S.C. § 1415(i)(2)(C)(iii)[5] was unchanged by the 1997 amendments, the addition of § 1412(a)(10)(C)(ii) as part of the 1997 amendments should properly be viewed as limiting the relief that may be granted pursuant to § 1415(i)(2)(C), which previously existed. To view § 1412(a)(10)(C)(ii) otherwise would render the language "previously received" as surplusage. The practical effect of the Court of Appeals' reading would be that Congress enacted a provision with no practical effect. This result should be avoided.

The Ninth Circuit found that the language of § 1412(a)(10)(C)(ii) is ambiguous "because the text does not *clearly* create a categorical bar and because such an interpretation is in tension with the broader context of the statute." 523 F.3d at 1088 (emphasis in original). If, in fact, an ambiguity exists, then the statute does not provide the "clear notice" required under the spending clause. *See Arlington Central School Dist. v. Murphy*, 548 U.S. 291 (2006). Nonetheless, it is respectfully urged that there is no

[5] Previously codified as § 1415(e)(2).

ambiguity. A district court's or hearing officer's authority to grant equitable relief should not extend to include the power to grant relief that is not permitted under the limiting language of § 1412(a)(10)(C)(ii). Consequently, in the absence of ambiguous statutory language, a resort to the canons of statutory construction is unwarranted.

The path chosen by the Ninth Circuit to avoid the plain language of § 1412(a)(10)(C)(ii) was to create an alternate route to obtain private school tuition reimbursement outside of § 1412(a)(10)(C). Specifically, the Ninth Circuit held that private school tuition reimbursement was available as an equitable remedy under § 1415(i)(2)(C). This argument, however, is also contradicted by the plain language of that section, because § 1415(i)(2)(C) grants "the court" the power to award "appropriate" relief.[6] It does not grant such power to hearing officers, yet the Ninth Circuit's decision requires that it do so.

II. The Plain Meaning Of Subsection (C)(ii) Is Consistent With The IDEA's Emphasis On Cooperation Between Parents And School Officials.

A straightforward reading of the statutory language is also consistent with the purpose and structure of the IDEA. Congress intended to promote cooperation between the parent and the school district, *see Schaffer v. Weast*, 546 U.S. 49, 53 (2005) ("[t]he core of the statute . . . is the cooperative process that it establishes between parents and

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[6] It is also worth noting that Congress entitled § 1415 "Procedural safeguards." Unlike § 1412(a)(10)(C)(ii), which is entitled "Reimbursement for private school placement," § 1415 does not contain a single reference to tuition reimbursement.

schools"), and it intended that if a parent genuinely wants to avail the child of a free appropriate public education, the public school must be afforded the opportunity to work with the parent. Subsection (C)(ii) demonstrates Congress's intent that the parent cooperate with the school district in a meaningful way, as well as Congress's recognition that the only way to foster cooperation is for the student to participate, even if for only a short while, in the public education process.

The purpose of the IDEA is to provide children with disabilities with access to a free appropriate public education ("FAPE"). 20 U.S.C. § 1400(c)(3). The IDEA, however, does not require states to provide a FAPE to every child. Where parents voluntarily place a child in private school, they are not entitled to a FAPE at public expense. Instead, the IDEA requires a state to provide only certain defined services, and then only the amount of those services that can be paid for with each child's proportionate share of funds under the IDEA. 20 U.S.C. § 1412(a)(10)(A).

Thus, the IDEA creates a distinction between students in private schools and students who are in public school or receive services under the authority of a public authority. Consistent with that distinction—and with the different obligations a state has in regard to children in those distinct situations—the IDEA places limits on the ability of parents to request private school tuition reimbursement, even where a court or hearing officer finds that the school district did not offer a student FAPE. For instance, under 20 U.S.C. § 1412(A)(10)(C)(iii), tuition reimbursement may be reduced or denied if at the most recent IEP meeting that the parents attended "prior to removal of the child from the public school," the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a

private school at public expense[7]; or if within "10 business days . . . prior to the removal of the child from the public school," the parents did not give written notice to the public agency.[8]

These limitations presume that the child was receiving services from the public school and that the child is being removed from the public school placement to be placed unilaterally in private school. Seen in the context of the statute, then, the "previously received" language makes perfect sense. It means that parents may request tuition reimbursement only for those students who have received special education and related services under the authority of the public agency. This limitation, like the factors contained in § 1412(A)(10)(C)(iii), is meant to foster cooperation between parents and school districts.

The Ninth Circuit's interpretation of the statute, on the other hand, is inconsistent with the IDEA's structure and would undermine the cooperation the IDEA is intended to foster. If students need not ever have received special education and related services from the public agency before requesting private school tuition reimbursement, then not only is the "previously received" language rendered meaningless, but the ten day notice requirement is rendered entirely ineffective, since there can be no notice "prior to removal of the child from the public school" if the child never received any services from the public school.

Indeed, the Ninth Circuit's interpretation would create a perverse incentive for parents to avoid ever trying to work out an appropriate placement with the school district. Under that interpretation, parents whose child

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[7] 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa).

[8] 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(bb).

participates in the public placement would be required to provide written notice of their intent to reject it ten days prior to removing the child from the public placement. If, however, the student never participated in the public placement, then the parent would not have to provide such notice. Thus, the Ninth Circuit's interpretation would make it less likely that parents would cooperate with school districts. This result would run counter to Congress's intent to foster more, rather than less, cooperation between parents and school districts.

III. The Ninth Circuit's Decision Is Contrary To The Legislative History Of The Statute And Is In Conflict With The IDEA's Emphasis On Educating Disabled Children With Their Non-Disabled Peers.

The IDEA, as a whole, foresees state implementation of federal standards. § 1412(a); *Cedar Rapids Community School Dist. v. Garret F.*, 526 U.S. 66, 68 (1999). As a matter of policy, Congress intended "to make public education available to handicapped children" with a goal of mainstreaming them into the public educational system. *Board of Education v. Rowley*, 458 U.S. 176, 192 (1982). States that receive funds under the Act must, in order of priority, provide education first to handicapped children who are not receiving an education, and second to the most severely handicapped children who are receiving an inadequate education. 20 U.S.C. § 1412(3). States must also, to the maximum extent appropriate, educate handicapped children with children who are not handicapped. 20 U.S.C. § 1412(5). Recognizing, however, that the nature or severity of some handicaps may be such that education in regular classes cannot be satisfactorily accomplished with the use of supplementary aids and services, the Act provides for the

education of some handicapped children in separate classes or institutional settings. 20 U.S.C. §1412(5); 1413(a)(4).

The Court has noted that

> "[t]he Act requires participating States to educate handicapped children with nonhandicapped children whenever possible. When that 'mainstreaming' preference of the Act has been met and a child is being educated in the regular classrooms of a public school system, the system itself monitors the educational progress of the child."

Board of Education v. Rowley, *supra*, 458 U.S. at 202-203.

The IDEA has three categories for children with disabilities who attend private school. The first category involves the situation where the school district places the child at a private school to receive special educational services. 20 U.S.C. § 1412(a)(10)(B). Such placement through the public school district is considered a public placement or program. *Burlington*, 471 U.S. 359, 369-70 (1985). The second category, referred to as "FAPE is at issue," involves the parent placing the child at a private school because FAPE or appropriate special education services are not available at the public school, and the parent places the child at the private school in order to obtain appropriate services. *Burlington*, 471 U.S. at 369-372; *Florence Co. Sch. Dist. v. Carter*, 510 U.S. 7; 20 U.S.C. § 1412(a)(10)(C). The third category, often referred to as "voluntarily enrolled in private school," involves situations where the school district has offered FAPE to the child, but the parents decline FAPE and instead choose to enroll the child in private school because of their personal preferences. 20 U.S.C. § 1412(a)(10)(A), (C); 34 C.F.R. § 300.450-462.

In 1985, the Court held that the remedy of tuition reimbursement was authorized under 20 U.S.C. § 1415(e)(2).[9] In *Burlington, supra*, 471 U.S. at 369, the Court noted that the Act

> "confers on the reviewing court the following authority: '[T]he court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determined appropriate.' § 1415(e)(2)."

In *Burlington, supra*, the Court determined that under the narrow circumstance where a parent unilaterally obtains and pays for special education services to which it is ultimately determined the child was entitled, the parent may be entitled to reimbursement, noting that:

> The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as nonhandicapped children, but the Act also provides for placement in private schools at public expense *where this is not possible*. See § 1412(5); 34 C.F.R. §§ 300.132, 300.227, 300.307(b), 300.347 (1984)(emphasis supplied).

[9] Recodified as amended 20 U.S.C. § 1415(i)(2)(C)(iii).

Burlington Sch. Comm. v. Dep't of Educ., supra, 471 U.S. at 369. *See also Florence County Sch. Dist. Four et al. v. Carter, supra*, 510 U.S. at 15.

Reimbursement of private school tuition is necessary only where it is determined after a hearing that the services offered by the school district are inadequate or inappropriate, the services chosen by the parents are appropriate, and equitable considerations support the parents' claim. *See* 20 U.S.C. § 1412(a)(10)(C)(ii); 34 C.F.R. § 300.403(c). Even where tuition reimbursement is authorized under the IDEA, the parents must show that the school district is incapable of providing FAPE and that the private school placement is proper. *Florence County Sch. Dist. Four et al. v. Carter, supra*, 510 U.S. at 13-15. Those conditions serve the public interest that public funds not be spent to support inappropriate private placements. *See* 64 Fed. Reg. 12602 (Mar. 12, 1999)(discussion of comments to 34 C.F.R. § 300.403(c)).

The statute has continued to evolve according to congressional policy and, accordingly, the IDEA was reauthorized by Congress in 1997. As with other reauthorizations of the statute, the 1997 reauthorization of the IDEA changed prior requirements and added new ones. The Report of the House Committee on Education and the Workforce explained that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." H.R. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. Those changes serve to define the rights of disabled children and their parents, and the responsibilities of local educational authorities with regard to the education of those children.

Thus, the 1997 amendments further clarified the degree of parental cooperation required by adding a section entitled "Payment for education of children enrolled in

private schools without consent of or referral by the public agency."[10] *Greenland School District v. Amy N.*, 358 F.3d 150, 152 (1st Cir. 2004). That section opens with a general policy statement that explains that the IDEA "does not require a local education agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility." 20 U.S.C. § 1412(a)(10)(C)(i).

The addition of 20 U.S.C. § 1412 to the Act is explained in H.R. Rep. No. 105-95:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have received special education and related services under the authority of a public agency.

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[10] 20 U.S.C. § 1412(a)(10)(C); *see* H.R. Rep. 105-95, at 93, reprinted in 1997 U.S.C.C.A.N. 78, 90. *See Gary S. v. Manchester Sch. Dist.*, 241 F. Supp.2d 111, 114-15 (D.N.H. 2003).

H.R. Rep. No. 105-95, at 92 (1997), as reprinted in 1997 U.S.C.C.A.N. 78, 90.

The 1997 amendments both clarified the circumstances under which tuition reimbursement would be available, and restricted the availability of that remedy by adding language providing that tuition reimbursement for a unilateral parental placement is available when the student "previously received special education and related services under the authority of a public agency." 20 U.S.C. § 1412(a)(10)(C)(ii).[11]

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[11] That language was also added to the applicable implementing regulations for IDEA, at the same time. 34 C.F.R. § 300.403(C). 34 C.F.R. § 300.403 states, in relevant part:

> (a) *General*. This part does not require an LEA to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made FAPE available to the child and the parents elected to place the child in a private school or facility.
>
> (c) *Reimbursement for private school placement.* If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private preschool, elementary, or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the

Thus, the 1997 amendments expressly limit the availability of the tuition remedy to children who received special education services at the public school before their parents enrolled them in private school. The legislative history indicates that this was a limitation that Congress clearly intended to adopt. *See* 34 C.F.R. § 300.403; H.R. Rep. No. 105-95, 1997 U.S.C.C.A.N. 78, 90. The addition of 20 U.S.C. § 1412 (a)(10)(C)(ii) as part of the 1997 reauthorization demonstrates a policy determination made at the discretion of Congress. The plain language of the IDEA amendments makes it clear that a threshold requirement for a claim of tuition reimbursement is that the child had previously received special education and related services from the public agency. The IDEA's history and the 1997 reauthorization of that statute demonstrate that Congress intended to limit the right of parents of children with disabilities to seek private school reimbursement as a remedy under the statute.

The 1997 amendments to the IDEA reinforced the principle that children should not be unnecessarily removed from regular educational environments. 20 U.S.C. § 1412(a)(5)(A). *See also Greenland School District v. Amy*

> agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made FAPE available to the child in a timely manner prior to that enrollment and that the private placement is appropriate.

The Department of Education's interpretative guidance to 34 C.F.R. § 300.403 clarifies that tuition reimbursement is only available on claims "made before a child is removed from a public agency placement." 64 Fed. Reg. 12406, 12601 (March 12, 1999).

N., *supra*, 358 F.3d at 152. This was accomplished, in part, by the elimination of "inappropriate financial incentives for referring children to special education." H.R. Rep. 105-95, at 90 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 87. It is beyond cavil that one specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. *Id*. at 91-92.

Under the IDEA, school districts must be given an opportunity to cure any alleged deficiency. To that end, the IDEA requires notice that special education is an issue in order for parents to bring a claim for tuition reimbursement. 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa). *Greenland*, *supra*, 358 F.3d 150; *see also Berger v. Medina City School District*, 348 F.3d 513 (reimbursement may be reduced or denied where parents did not comply with notice requirements under the IDEA). The Court of Appeals for the First Circuit has noted that those statutory provisions demonstrate Congress's intent that before parents place their child in private school, they must at least give notice to the public agency that special education is at issue. The First Circuit found that this "serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided" in the public schools. *Greenland*, *supra*, 358 F.3d at 160.[12]

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[12] The IDEIA or "New IDEA" provisions went into effect in July 2005. 20 U.S.C. § 615 *et seq*. One of the new provisions specifically calls for a "last chance meeting" between the local educational agency and the parents before the parents seek an impartial due process hearing. The enactment of that provision can only be read as Congress' continuing attempt to address the situation of parents unilaterally withdrawing their children from local

In the instant case, the Court of Appeals for the Ninth Circuit failed to consider an express purpose of the IDEA, which is to educate handicapped children with nonhandicapped children whenever possible. The Ninth Circuit also ignored the fact that a specific purpose of the 1997 amendments was to control government expenditures for students voluntarily placed in private schools by their parents. This Court has noted that "Congress has also repeatedly amended the Act in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes (citation omitted)." *Schaffer, supra*, 546 U.S. at 59.

Public policy does not require that the parents of children who require special education and related services be reimbursed for unilaterally placing those children in private school where the parent's rejection of the public placement is based upon mere speculation that it is inappropriate. Permitting reimbursement under those circumstances frustrates the policy of mainstreaming disabled children whenever possible.

IV. The Ninth Circuit's Holding Is In Conflict With This Court's Spending Clause Decisions Because The IDEA Does Not Provide Clear Notice Of The States' Obligation To Provide Private School Tuition For Students Who Have Not Previously Received Special Education And Related Services From The Public Agency.

The IDEA was enacted by Congress pursuant to the Spending Clause. *See Schaffer v. Weast*, 546 U.S. 49, 51 (2005). Consistent with this Court's Spending Clause

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public educational agencies without allowing those agencies the opportunity to resolve the parents' complaint.

jurisprudence, when Congress attaches conditions to a state's acceptance of federal funds, those conditions must be unambiguously set out, *Arlington*, *supra*, 548 U.S. 291, because a law "that conditions an offer of federal funding on a promise by the recipient . . . amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Independent School Dist*., 524 U.S. 274 (1998).

The Court has noted that "[t]he legitimacy of Congress' power to legislate under the spending power . . . rests on whether the State voluntarily and knowingly accepts the terms of the 'contract.' There can, of course, be no knowing acceptance if a State is unaware of the conditions or is unable to ascertain what is expected of it." *Pennhurst State Sch. And Hosp. v. Halderman*, 451 U.S. 1, 17 (1981). Accordingly, a court must narrowly interpret Spending Clause legislation, so that States are not burdened with unanticipated obligations. *Cedar Rapids Community School District v. Garret F., supra*, 526 U.S. at 84.

Two principles made clear in this Court's decisions interpreting the IDEA are particularly relevant in this case. First, where a possible interpretation of the IDEA would result in a determination that a "distinct class of people has independent, enforceable rights" and "results in a change to the States' statutory obligations," the IDEA must be read in accordance with the Spending Clause requirement that it provide clear notice of the States' obligation. *Winkelman v. Parma City School District*, 550 U.S. 516, 534 (2007). In *Winkelman*, the Court held that the IDEA grants parents of disabled children the independent right to sue school districts for violations of the IDEA. In so doing, the Court rejected the *Winkelman* respondent's argument that the IDEA was ambiguous as to whether parents had an independent right to sue and that therefore the Court's spending clause jurisprudence prohibited an interpretation granting parents such a right. The Court distinguished the situation from its decision in *Arlington*, 548 U.S. 291, in

which the Court applied the clear notice rule in deciding that the IDEA does not require States to reimburse experts' fees to prevailing parties in IDEA actions. The Court pointed out that in *Arlington*, the question was whether "IDEA 'furnishes clear notice regarding the liability at issue.'" 505 U.S. at 534, *quoting Arlington*, 548 U.S. at 296. In *Winkelman*, however, the issue did not involve the creation of a new right or state liability, but only who could sue to enforce already existing rights under the IDEA. 505 U.S. at 534.

This Court's decisions, then, establish that the clear notice rule applies if an interpretation of a Spending Clause statute such as the IDEA will impose a "substantive condition or obligation on States that they would not otherwise be required by law to observe." *Id.* Here, as the City of New York's experience demonstrates, the Ninth Circuit's interpretation of the statute would impose upon States the obligation to pay private school tuition for a class of students who otherwise would not receive such payment. Thus, the statute must be viewed through the lens of this Court's Spending Clause jurisprudence.

Second, as the Court stated in *Arlington*, "[t]he IDEA obviously does not seek to promote [its] goals at the expense of all other considerations, including fiscal considerations." 548 U.S. at 303. In reaching its decision, the Ninth Circuit "emphasize[d] in particular that the express purpose of the IDEA is 'to ensure that *all* children with disabilities have available to them a free appropriate public education.'" 523 F.3d at 1087, *quoting* 20 U.S.C. § 1400(d)(1)(A)(emphasis in original). This broad goal does not trump the serious financial consequences of the Ninth Circuit's interpretation, such as those experienced by the City of New York, and does not lessen the need for the statute to provide clear notice to States of their obligation to pay private school tuition even to students who have not previously received special education and related services

under the authority of a public agency. *See Arlington,* 548 U.S. at 303.

In the instant case, the Ninth Circuit's decision is inconsistent with this Court's recent decision in *Arlington*, *supra*. The Ninth Circuit left that decision unmentioned and, indeed, made no mention at all of the Spending Clause. This was error.

If, as the Ninth Circuit reasoned, the language of 20 U.S.C. § 1412 (a)(10)(C)(ii) is ambiguous in light of the potential relief available under §1415(e)(2), that ambiguity defeats any claim that Congress unambiguously conditioned the receipt of federal funds on potential liability to pay private school tuition for students who had never received special education and related services from the public agency. An ambiguous statute by definition does not provide clear notice of the States' liability. States could not knowingly accept conditions of which they are unaware or which they are unable to ascertain.

It is appropriate to view the IDEA from the perspective of a state official who would decide whether the State should accept IDEA funds and the obligations accompanying the acceptance of those funds. *Arlington*, *supra*. The question here is whether such a state official would clearly understand that one of the obligations imposed by the IDEA is an obligation to reimburse parents who unilaterally place their children in private school when those children have never previously received special education and related services from the local educational agency.

It is respectfully submitted that no clear notice of such an obligation is provided by the Act. The language of 20 U.S.C. § 1412 (a)(10)(C)(ii) does not even hint that the acceptance of IDEA funds made local educational agencies responsible for reimbursing parents who unilaterally place their children in private schools when the children have never received special education and related services from

the public agency. And the text of 20 U.S.C. § 1415 (e)(2), which does not mention tuition reimbursement, also fails to provide the clear notice that is required under the Spending Clause to attach such a condition to a State's receipt of IDEA funds. Since the statute does not clearly impose that obligation, the Court's Spending Clause jurisprudence prohibits it.

States could not anticipate having to incur the enormous economic impact of having to reimburse parents who unilaterally placed their disabled children in private schools without having first afforded the local educational agency an opportunity to provide a free appropriate public education, especially where the plain language of the statute provides that the child must have previously received special education and related services from the public agency in order for the parent to be eligible for tuition reimbursement. Given the magnitude of the potential economic impact upon the States if a parent may unilaterally place a child in private school and seek tuition reimbursement even though the child has not previously received special education and related services from the local educational agency, it cannot be presumed that the States would have knowingly and voluntarily accepted such an obligation. *See Pennhurst, supra*, 451 U.S. at 17.

In sum, the plain language and legislative history demonstrate that Congress did not intend to impose burdens of unspecified proportions and weight upon the States in enacting the IDEA. *See Rowley, supra*, 458 U.S. at 176. It is respectfully submitted that the statute on its face requires that the child must have previously received special education and related services from the public agency in order for the parent to be eligible to receive tuition reimbursement for the child's private education. Accordingly, the Court should interpret 20 U.S.C. § 1412(a)(10)(C)(ii) in accordance with its plain language and the constitutionally mandated principles of construction applicable to Spending Clause legislation.

CONCLUSION

This Court should reverse the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

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March 3, 2009

Honorable William K. Suter
Clerk of the Court
Supreme Court of the United States
1 First Street N.E.
Washington, D.C. 20543

Re: Forest Grove School District v. T.A.
Case No. 08-305

Dear Mr. Suter:

As required by Supreme Court Rule 33.1(h), I certify that the City of New York's amicus brief in the above-referenced appeal contains 8,369 words, including the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Respectfully,

Drake A. Colley
Senior Counsel
Appeals Division

cc: Public Citizen Litigation Group
Mary E. Broadhurst
Sidley Austin LLP
Hogan & Hartson

SUPREME COURT OF THE UNITED STATES
Docket No. 08-305

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FOREST GROVE SCHOOL DISTRICT,

Petitioner,

AFFIDAVIT OF SERVICE

v.

T.A.,

Respondent.

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STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

I, Moses Williams, being duly sworn, deposes and says:

On the 3rd day of March, 2009, I served the Brief of Amicus Curiae City of New York in Support of Petitioners in the above-captioned matter upon:

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By depositing three copies of same, enclosed in a properly addressed wrapper into the custody of the UPS Service prior to the latest time designated by the Service for overnight delivery.

That on the same date as above, I sent to this Court forty copies of the within Brief of Amicus Curiae City of New York in Support of Petitioners enclosed in a properly addressed wrapper into the custody of the United States Postal Service prior to the latest time designated by the Service for overnight delivery.

All parties required to be served have been served.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on this day of

Moses Williams

Sworn to before me this
4th day of March, 2009

NOTARY PUBLIC

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Qualified in New York County
Commission Expires 02/04/10